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Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 374.

THE TIMES-PICAYUNE PUBLISHING COMPANY ET ALI., *Appellants,*

v.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF POST PUBLISHING COMPANY, OF BOSTON, MASSACHUSETTS, AS *AMICUS CURIAE.*

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PRELIMINARY STATEMENT.

This brief, supporting the Government, is filed in behalf of Post Publishing Company, a Massachusetts corporation located in Boston, publisher of the Boston Post, a daily morning and Sunday newspaper. It has an interstate field.

The Post Publishing Company is the only publisher of a morning newspaper in Boston which does not also publish an evening paper. It has three competitors covering both the morning and evening fields, all of which employ tying-in contracts for morning and evening advertising similar to those employed by The Times-Picayune Publishing Company, the combined force of which, whether resulting

from agreement among the publishers, or separately employed, has had disastrous effect on the Post, in depriving it of advertising and reducing its circulation.

The brief of the *amici curiae* proffered in support of the defendants throws great emphasis on the hardship which will fall upon the leading newspapers of the country should this Court condemn the prevalent practice of imposing combination-rates for morning and evening advertising, but gives no thought to the predicament of the newspapers which are the victims of that practice, already weakened and helpless in the face of it, and, indeed, actually threatened with extinction should the practice continue.* It is in behalf of such newspapers, of which the Post is one, that this brief is filed.

The opinion of the District Court may be found in 105 Fed. Supp. 670.

SCOPE OF BRIEF.

This brief does not essay to cover all the ground covered by the Government's brief, and seeks to avoid repetition of what has been said there.

We shall direct our argument to a close analysis of the evidence which supports the District Court's finding that there was a violation of section 1 of the Sherman Act, and to the proposition that the forced combination-rate contracts adopted by the defendant publisher constituted contracts in restraint of trade violative of section 1 by reason of the fact that they resulted in depriving purchasers of

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*". . . newspaper merger, mortality, and combination have been the principal factors in a 20th Century trend toward single-publisher communities . . . the total number of dailies fell by one-fourth between 1909 and 1950." Local Monopoly in the Daily Newspaper Industry, 61 Yale L.J. 948, 949.

classified and general display advertising in the community of freedom of choice in placing their advertising.

ARGUMENT.

THE FORCED COMBINATION-RATE ADOPTED BY DEFENDANT IS A VIOLATION OF SECTION 1 OF THE SHERMAN ACT BECAUSE IT UNREASONABLY RESTRAINS THE FREEDOM OF CHOICE OF PURCHASERS OF CLASSIFIED AND GENERAL DISPLAY ADVERTISING.

Given the three daily newspapers among which advertisers might freely have chosen, their actual choices of medium must necessarily have fallen into the following groups:

1. Times-Picayune alone,
2. States alone,
3. Item alone,
4. Times-Picayune plus States,
5. Times-Picayune plus Item,
6. States plus Item,
7. Times-Picayune plus States plus Item.

These seven types of *possible* choice on the part of advertisers are necessarily restricted by the introduction of a forced combination-rate applicable to any two of the papers in question. In the present case the forced combination-rate applicable to the Times-Picayune and States obviously eliminates choices numbered 1, 2, 5 and 6.* Advertisers are no longer free to make *those* choices.

*The rate also restricts, though it does not eliminate, choices of types 4 and 7, since the advertiser is required to purchase the *same lineage* in the Times-Picayune as in the States. *E.g.*, an advertiser could no longer select the following lineage distribution: Times-Picayune, 50%; States, 10%; Item, 40%. This effect is dramatically shown in Exs. G-106A, G-107A.

The question whether such a restriction on the advertiser's freedom of choice is a substantial one is a matter which, of course, must be decided, not by logical analysis, but by evidence as to the actual distribution of advertisers' demand in the New Orleans market. On the evidence in this record, substantial demand for types 1, 2, 5 and 6 existed in the New Orleans market prior to the adoption of the forced combination-rates for classified and general display advertising. It appears from exhibits in the record that the distribution of demand for general display advertising, as shown by actual purchases of space prior to the adoption of the forced combination-rates, was as follows:*

1.	Times-Picayune alone	22.7%
2.	States alone	2 %
3.	Item alone	9.6%
4.	Times-Picayune plus States	23.7%
5.	Times-Picayune plus Item	9.7%
6.	States plus Item	1.9%
7.	Times-Picayune plus States plus Item	30.4%

In the case of general display advertising, categories 1, 2, 5 and 6 amounted in 1949, just prior to the introduction of the forced combination-rate, to 36.3% of the total demand for space of this character. Such a percentage is obviously substantial. The direct and necessary result of the forced combination-rate is to make it impossible for

*Government Exhibits 109A and 109B, which show the distribution of space in 1949 prior to the adoption by the defendant of the forced combination-rate for general display advertising. The market thus pictured does not represent absolutely free competition even then among the three newspapers since there was then in effect an *optional* combination-rate for those who used the Times-Picayune-States combination (Finding 24).

36.3% of general advertisers to satisfy their demand in the open market. They are necessarily driven to other choices of types 3, 4 and 7. The distribution of advertising thus is no longer in accordance with the demand of advertisers freely exercised in the open market. By the forced combination-rate it is distorted into the following:*

1. Times-Picayune alone	5.8%
2. States alone	0.4%
3. Item alone	10.6%
4. Times-Picayune plus States	41 %
5. Times-Picayune plus Item	2.5%
6. States plus Item	0.7%
7. Times-Picayune plus States plus Item	39 %

Plainly on this record the forced combination-rates have effected a substantial redistribution of advertising purchased in New Orleans daily papers and have done so by drastically narrowing the possible choices previously open to advertisers. This we submit is a substantial and unreasonable restraint of trade within the meaning of section 1 of the Sherman Act.

Plainly, also, the forced combination-rates directly restrain competition between the Item and the defendant publisher. Prior to the introduction of those rates the Item was able to satisfy the needs of advertisers whose

*Government Exhibit G-110A, based on Exhibits G-109A to G-110B. These exhibits show the actual distribution of purchases of space during the year 1950, just after the introduction of the forced combination-rate for general display advertising. It will be observed that categories 1, 2, 5 and 6 have not completely disappeared. This is attributable to the fact that the forced combination-rate did not go into effect until February, 1950, and the fact that defendant permitted unexpired contracts calling for the Times-Picayune or the States alone to be completed (Exs. G-30, G-33). Plainly categories 1, 2, 5 and 6 must vanish unless the forced combination-rate is discontinued.

demand fell* into categories 5 and 6. It can no longer compete for business of this type since such choices have been rendered impossible by the introduction of the combination-rates. As a direct result of the introduction of such rates the Item's share of general newspaper advertising in evening papers in New Orleans had fallen from 49.2% in 1949 to 42.1% in 1950 (Exs. G-108A, G-108B).

The case of *International Salt Company, Inc.* v. *United States*, 332 U.S. 392, establishes that such a restraint violates section 1 of the Sherman Act. There the defendant required, in leases of patented salt dispensers to canners, that the lessees use in the leased devices salt purchased from the defendant. It appeared that sales of salt by the defendant for this purpose amounted to $500,000 per annum (p. 395). There was no evidence as to total sales of salt to canners by all sellers. On this showing this Court held that a summary judgment was properly entered for the Government.

Defendant will undoubtedly urge that the *International Salt* case rests on domination of the market by means of a "legal monopoly," *i.e.*, a patent, whereas the effect brought about by the defendant publisher in the present case is based, not on a patent or other "legal monopoly," but on its *de facto* position in the market as owner of the only morning paper in New Orleans.

In fact, however, the decision in the *Salt* case in no way rests upon *domination* of the market by defendant. There was no showing of such domination. The total sales of salt to canners were not in evidence and by force of the decision itself could not have been put in evidence. All that appeared was that the International Salt Company was the

*Or *might* fall. It cannot be assumed that the distribution of demand for space shown by the 1949 figures would remain constant forever.

largest seller of salt to canners, and that its actual volume of such sales amounted to $500,000 per annum. Furthermore, it is plain that salt dispensers might have been had from others. Cf. *Morton Salt Company* v. *G. S. Suppiger Company*, 314 U.S. 488; *Standard Oil Company of California* v. *United States*, 337 U.S. 293, 307. It is to be observed also that the leases involved in the *Salt* case did not prohibit the lessees from using at the same time other types of salt dispensers, nor from buying salt elsewhere for use in such dispensers. Cf. *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463.

Furthermore, to talk of the "legal monopoly" of the defendant in the *Salt* case is to beg the question. The defendant, to be sure had a patent, but the validity of the patent as against the lessees was not involved in that case and cannot be treated as if it had been conclusively adjudicated. At most the patent can only have been assumed to be prima-facie valid. See *Standard Oil Company of California* v. *United States*, 337 U.S. 293, 307.

Examined realistically the market situation involved in the *International Salt* case comes down to this: A canner might choose among several types of patented dispensers (let us assume there were two, manufactured by A and B). He might, under conditions of unrestrained competition, purchase salt from one or more of several sellers (let us assume A and B are the only sellers). Under conditions of unrestrained competition, the demand of canners would necessarily fall into the following categories:

1. Dispenser A and A salt.
2. Dispenser A and B salt.
3. Dispenser A and A and B salt.
4. Dispenser B and A salt.
5. Dispenser B and B salt.
6. Dispenser B and A and B salt.

A given canner thus would have, in an unrestricted market, six possible types of choice available. If, now, either A or B decides to employ tying-clauses in its leases of dispensers, two of those six choices disappear, and if both A and B employ tying-clauses, four of the six possible choices are foreclosed. Clearly in this situation *both A and B* have violated section 1 of the Sherman Act. *International Salt Company, Inc.* v. *United States*, 332 U.S. 392. Cf. *Morton Salt Company* v. *G. S. Suppiger Company*, 314 U.S. 488. Such a finding is compelled merely on a showing that A and B are substantial sellers of salt. It is not necessary to show that either, or both together, *dominate* the market. If there were ten such sellers, sharing the market equally, each would obviously be guilty of an unreasonable restraint of trade within the meaning of section 1 of the Sherman Act.

In our view the restraint of trade committed by the defendant-publisher in the present case does not *necessarily* depend upon the fact that it owns the only morning newspaper in New Orleans, though, of course, its ability to restrain is greatly enhanced by that fact. If the Item also published a morning paper, and also adopted a forced combination-rate applying to both its papers, *both* publishers would be guilty of a restraint of trade upon a showing that the demand for the combinations Times-Picayune-Item, and Morning-Item-States was substantial.*

*The problem may be stated a little more precisely. In a case where advertisers have a perfectly unrestrained choice among four papers, there are fifteen possible choices open to them: (1). The four papers taken singly; (2) six combinations of the four taken two at a time; (3) four combinations of the four taken three at a time; (4) one combination of the four taken four at a time. If *both* publishers introduce forced combination-rates, these fifteen choices open to advertisers are reduced to three. Upon a showing of substantial demand by advertisers *for the other twelve*, it is submitted that *both* publishers would, in the case supposed, be guilty of violating section 1 of the Sherman Act.

While dominant position may well be the controlling factor in producing the coercive effect, it need not be the only factor, nor indeed is it a necessary factor, if the coercive power exists and is successfully employed.

So, in *United States* v. *General Motors Corporation*, 121 F. (2d) 376 (C.C.A. 7th, 1941), the Court, by Kerner, Cir. J., said (at p. 400):

> "Of course, the utilization of the manufacturer's dominant position and the tremendous popularity of General Motors automobiles, among other things heretofore explained, made it possible for the appellant to force the sale of the related finance service."

Nor, it is submitted, does the *Salt* case rest on any doctrine peculiar to the law of patents. *The vital question is this: Is the freedom of choice of purchasers substantially restricted?* Restriction may be brought about by the use of patents, copyrights (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131), or, in the absence of such prima-facie "legal monopolies," by the use of the defendant's total or partial market control over certain commodities or facilities. *United States* v. *Griffith*, 334 U.S. 100. *United States* v. *General Motors Corporation*, 121 F. (2d) 376 (C.C.A. 7th, 1941).

In the two cases just cited the ability of the defendant to restrain free choice of those with whom it dealt rested in no way upon patent or copyright or other "legal monopoly." In the *Griffith* case the defendants' ability to distort market conditions rested on their ownership of the sole theaters in certain "closed" towns. By combining purchases for such theaters with those for other theaters owned by them in competitive or "open" towns, defendants were able to obtain advantages in bookings over competing theaters in "open" towns. These bookings, of course, incidentally involved copyright licenses from dis-

tributors, but the defendants owned no copyrights and the strength of their position, which enabled them to distort the normal market situation, in no way rested on a "legal monopoly." It rested rather on the "natural monopoly" arising from ownership of theaters in "closed" towns. We submit that the result of the case would have been the same had the defendants combined to obtain advantages over their competitors in the purchase of popcorn rather than copyright licenses.

In *United States* v. *General Motors Corporation* no "legal monopoly" was involved. There the defendant by its control of the supply of General Motors cars was able to prevent its dealers from choosing freely among finance companies and to force them to finance through General Motors Acceptance Corporation, a wholly owned subsidiary of General Motors. No "domination" of the market in automobiles was shown—the defendant merely controlled the supply of a commodity much desired by the public.

In *Standard Oil Company of California* v. *United States*, 337 U.S. 293, a Clayton Act case involving tying devices, this Court said by Mr. Justice Frankfurter (at p. 306):

> ". . . In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, *whether conferred by patent monopoly or otherwise obtained,* could induce a buyer to enter one . . . The existence of market control of the tying device, therefore, affords a strong foundation for the presumption that it has been or probably will be used to limit competition in the tied product also." (Emphasis supplied.)

In our view the parallelism between the present situation and that presented in the *International Salt* case is strik-

ing. Where differences exist they make the present case a stronger one for the Government.

	International Salt Case	Present Case
1. Basis of defendant's power to restrict freedom of choice of purchasers.	Prima-facie valid patent upon *one of a number* of salt dispensers.	Control of *the only* morning paper, which is the chief newspaper advertising medium.
2. Method of restricting freedom of choice of purchaser.	Refusal to license use of dispenser unless licensee agrees to use therein only salt purchased from licensor.*	Refusal to run advertisement in morning newspaper unless it is run in evening paper as well.*
3. Amount of trade affected.	$500,000 per annum.	58% of general daily newspaper advertising (Finding 30).
4. Effect on competitors.	Not shown.	Competitor's share in classified advertising in evening papers dropped from 65% in 1934 to 32% in 1950 (Finding 21); in general advertising in evening papers from 49.2% in 1949 to 42.1% in 1950 (Exs. G-108A, G-108B).

So far as the basis of the defendant publisher's power is concerned, the present case is obviously far stronger

*In neither case is there a requirement that purchasers deal only with defendant. In the *Salt* case canners were free to lease other dispensers, as well as those of the defendant, and to buy salt elsewhere, though they could not use it in defendant's dispensers. In the present case advertisers in the Times-Picayune-States may also advertise in the Item, supposing that there is enough left in their budgets to permit it (*cf.* Finding 29).

than that presented in *International Salt Company, Inc. v. United States*. There a canner who wished to retain his freedom of action might (1) lease a salt dispenser from a competitor of defendant; (2) manufacture or have manufactured for him a salt dispenser like defendant's. Cf. *Morton Salt Company* v. *G. S. Suppiger Company*, 314 U.S. 488. In the latter case he might, of course, be sued for infringement of defendant's patent. That suit might or might not be successful.* The basic holding of the *Salt* case is that the mere threat of an infringement suit in order to compel canners to buy salt from the patentee constitutes an unreasonable restraint of trade.

In the present case no advertiser can obtain space in a morning newspaper unless the defendant publisher is willing. Unlike the situation in the *International Salt* case the defendant here has the power to deny absolutely the desirable facility in question. Obviously it is no answer to say to an advertiser, or to all advertisers as a group, that they may, if they wish, found another morning newspaper for themselves. It is completely beside the point, therefore, that the defendant has not a "legal monopoly." It has a *de facto* position in the market which is far more powerful.

There is in the present case abundant evidence as to the adverse effect upon the competing newspaper, the Item, of the forced combination-rates employed by the defendant publisher (*supra*, p. 11). No such evidence was present in the *International Salt* case.

It is submitted, therefore, that the result reached by the lower Court in this case follows *a fortiori* from the decision of *International Salt Company, Inc.* v. *United States*.

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*It cannot, of course, be assumed that the patent is valid. It has, at most, a prima-facie validity. *Standard Oil Company of California* v. *United States*, 337 U.S. 293, 307.

CONCLUSION.

It is earnestly argued by the defendants and in the supporting brief of *amici curiae* in their behalf that to enjoin the unit combination-rates such as used on general advertising by "approximately 180 publishers, constituting the vast majority of the publishers publishing morning and evening newspapers" (Finding 26, Statement as to Jurisdiction, p. 38) will be very disadvantageous to the defendant and to other newspaper publishers and greatly impair their ability to operate profitably.

To such argument the language of this Court, speaking by Mr. Justice Douglas, in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (at p. 159), is peculiarly apposite:

> "Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the anti-trust laws receive judicial sanction."

Respectfully submitted for

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